



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Paladin U.S.A., Inc.

File: B-236619.3

Date: March 13, 1990

Patrick J. Martell, Esq., Pettit & Martin, for the protester.
S. Lane Tucker, Esq., Office of the General Counsel, General Services Administration, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Challenge to award of a lease to a higher-priced offeror by the General Services Administration (GSA) is denied where protester's building was badly damaged in an earthquake after receipt of third round of best and final offers and the contracting officer reasonably decided that GSA could not wait to receive engineering analyses detailing damage to the building and repairs needed to bring the building into compliance with the solicitation, because of concerns that GSA might lose access to an acceptable building for its tenant agency, and lose the benefit of an already-extended competition.

DECISION

Paladin U.S.A., Inc., owner of the building at 215 Fremont Street, San Francisco, protests the award of a lease by the General Services Administration (GSA) to Hawthorne Plaza, Ltd., for office space in the building located at 75 Hawthorne Plaza for a period of 5 years with three 5-year options. The award was made under GSA's solicitation for offers (SFO) No. MCA 89240, for a minimum of 135,579 to a maximum of 142,715 net usable square feet of office and related space together with eight parking spaces for use by the San Francisco regional office of the Environmental Protection Agency (EPA). Paladin argues that GSA's decision not to award to Paladin was unreasonable and the result of agency bias against the building Paladin offered.

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We deny the protest.

Prior to issuing the SFO on February 10, 1989, GSA solicited expressions of interest in leasing to EPA from building owners, or their representatives, with advertisements in Oakland and San Francisco newspapers. After reviewing the expressions of interest and conducting a market survey of potentially eligible buildings, GSA issued the SFO to the owners of seven buildings, and called for initial offers to be submitted by March 13. Only Paladin and Hawthorne submitted offers in response to the SFO.

During the course of this procurement there were extensive discussions between GSA and the two offerors, culminating in three rounds of best and final offers (BAFOs). One of the reasons for the extensive discussions was that 215 Fremont required substantial renovations to meet the requirements of the SFO, including a seismic upgrade, although EPA has been housed at 215 Fremont for the last 10 years. The property offered by Hawthorne, on the other hand, is a new building but requires "building out" to complete the interiors for an office tenant.

After receipt of the third round of BAFOs and while evaluation was ongoing, a major earthquake struck the San Francisco Bay Area late in the afternoon of October 17. The earthquake caused damage to Paladin's building at 215 Fremont Street; the Hawthorne Plaza Building was not damaged. Ten days later, on October 27, the contracting officer awarded the long-term lease to Hawthorne. The lease requires the property to be ready for occupancy within 150 days after GSA approves the "build-out" drawings to be submitted by Hawthorne.

The record shows that GSA awarded to Hawthorne, the higher-priced offeror, after considering the physical condition of Paladin's building as a result of the earthquake, the uncertainty surrounding the use and occupancy of Paladin's building at any time in the foreseeable future, and the urgent circumstances that faced the government in the displacement of a large tenant agency such as EPA. In making this decision, GSA decided it could not postpone the procurement for Paladin to complete the engineering analysis needed to determine how much damage the building had sustained, and how much renovation would be required to both repair the building and bring it into compliance with the requirements in the SFO.

EVENTS AFTER THE EARTHQUAKE

The day after the earthquake, October 18, a team of engineers from the City of San Francisco inspected the 215 Fremont Street building and gave it a "limited entry" classification, restricting public access to the building pending further evaluation. As a result of the damage sustained by the building, and the limited entry classification, EPA's use of 215 Fremont was drastically curtailed and most employees were placed on administrative leave or asked to work from their homes.

The next day, October 19, GSA wrote a letter to all owners of government-leased buildings in the San Francisco Bay Area, including Paladin, asking for an inspection report by a California licensed structural engineer certifying the building to be structurally sound prior to reoccupancy by the government. This letter, although stating that GSA would also be inspecting area buildings, made building owners responsible for providing a detailed certification to include the type and location of damage, and, if applicable, the efforts necessary to cure the damage to bring the space into tenantable condition, and the time frame for completing the work.

In addition to the request that building owners hire structural engineers, GSA structural engineers were also directed to participate in identifying those structures not safe for reoccupancy due to damage sustained in the earthquake. GSA's structural engineer first conducted a short visual inspection of 215 Fremont Street on October 21. The following day, October 22, the GSA engineer again inspected Paladin's building, together with Paladin's engineer hired to certify the soundness of the building, as required by GSA's letter of October 19.^{1/}

On October 23, GSA's structural engineer met with representatives of GSA and EPA, including the contracting officer conducting the lease procurement, and gave a verbal report on the condition of 215 Fremont based on his two inspections of the property. During this meeting, GSA's structural engineer stated that the building had been badly damaged, that in his opinion the building was in dangerous condition and should not be reoccupied without thorough study and analysis, and that it might take 3 months to determine the extent of the damage. Also on October 23, the contracting officer received a copy of Paladin's engineer's assessment

^{1/} The record shows that Paladin's engineer also inspected the building on October 19 and 21.

of the earthquake damage to 215 Fremont.^{2/} Paladin's engineer concluded that the building could be safely reoccupied on the basement through sixth floors with certain limitations: there should be no occupancy permitted within 20 feet of the Howard Street wall of the building; and "[p]ermanent reinforcement of the building should occur before any further long term (5 years and over) occupancies are considered."

Based on the information known by October 23 and described above, the contracting officer states, in a sworn declaration, that he "determined that the Government's only course of action was to proceed to award the long term lease as quickly as possible." Accordingly, on October 24, the contracting officer, by letter, asked for EPA's concurrence with the decision to award a long-term lease to Hawthorne; on October 25, EPA, also by letter, agreed with GSA's decision to proceed with the lease of 75 Hawthorne Plaza.

On October 25, GSA's structural engineer and other government representatives, together with the GSA contracting officer administering the existing lease of 215 Fremont for EPA, again inspected the building. On the same day, the GSA officials involved in the inspection completed and signed a Condition Survey Report detailing the damage to 215 Fremont seen during their inspection. Based on the conditions seen during the inspection, the GSA's structural engineer's verbal report, and Paladin's engineer's report, the contracting officer administering the existing lease determined that the 215 Fremont Building was untenable. Accordingly, Paladin's existing lease was terminated on October 26, and a 1-year interim lease for EPA was awarded to the owners of a building at 1235 Mission Street in San Francisco. The long-term lease was awarded to Hawthorne on October 27.

^{2/} The report prepared by Paladin's engineer on October 23 is a preliminary review based on a visual assessment of the earthquake damage sustained by the building. The engineer cautions that the report is the result of a subjective review only and that no calculations or analysis have been made beyond the slightly more than two pages of text. Paladin's engineer submitted a more detailed report to GSA and GAO on January 12, 1990, during the GAO conference on this protest.

ANALYSIS

GSA asserts that it acted in the best interests of the government in deciding that it needed to proceed swiftly to award after the earthquake to assure that it would be able to provide housing for the San Francisco office of the EPA. GSA claims that an engineering study of the damage to 215 Fremont would have required up to 9 weeks to complete once an engineering firm began the project, that there were no assurances such a study would conclude the building could be repaired, and that GSA could not be certain the work could be completed in a reasonable period of time. Further, GSA argues that prior to the earthquake Paladin had never demonstrated it had the financial capability to renovate the building to meet the standards of the SFO, much less the financial capability to perform the work needed to repair the earthquake damage.

Paladin challenges every facet of the GSA decision to reject its offer, arguing that any assertion that Paladin was not financially capable, and thus not responsible, was unreasonable; that GSA's structural engineer overstated the earthquake damage to 215 Fremont; that GSA unreasonably refused to accept Paladin's engineer's assessment of the damage, while accepting the more conservative assessment of the GSA engineer; that there was no urgency to proceed with award of this lease because there was ample vacant office space in the San Francisco Bay Area; that GSA's award to a property requiring a "build-out" of 150 days duration after approval of drawings belied any claimed urgency; that GSA's concern that Hawthorne might rescind its offer was unreasonable given the excess space in the San Francisco real estate market and Hawthorne's alleged previous difficulty in leasing its space; and that GSA's refusal to meet with representatives of Paladin after the earthquake indicated GSA's bad faith.

Initially, we note that by the time of the earthquake, Paladin had not satisfied GSA's concerns about Paladin's financial capability and financial commitment to renovate 215 Fremont to provide a "first-class" office building as required by the SFO. Since the receipt of initial offers, GSA had sought repeatedly to ascertain both Paladin's willingness and capability to perform renovations, including a seismic upgrade, that were identified as needed before the earthquake. The record shows that Paladin was uncooperative in these efforts, and in one response to GSA, Paladin went so far as to suggest that the projected costs of such renovations should be of no concern to GSA, since the projected costs did not impact on the cost of the lease offered to GSA.

As late as September 21, GSA's Credit and Finance Office in Kansas City advised the contracting officer that it could not affirmatively establish Paladin's financial responsibility to complete the needed renovations. In this letter, the Credit and Finance Office stated that due to the unusual form of the financial information provided by Paladin, it would defer to the contracting officer regarding an affirmative determination of responsibility. Thus, after the earthquake GSA found itself in a situation requiring an immediate lease commitment where only one offeror, Hawthorne, had conclusively established its responsibility.

More important, the report of GSA's engineer recommended that 215 Fremont not be occupied by EPA and that no determination about future occupancy be made until a thorough study of the building was done and the building was evaluated for existing damage and future potential damage. Specifically, the GSA engineer's report concluded it was important to determine:

" . . . the damage to the structural members and non-structural components in all areas of each floor . . . the condition of the foundations . . . the strength of the lateral and vertical load resisting members such as shear walls, columns and floor slabs through core bearings."

Paladin argues that GSA acted unreasonably in accepting the conclusion of its own structural engineer that 215 Fremont should not be reoccupied over the report of Paladin's engineer and two other engineers.^{3/} We disagree. An agency is entitled to rely upon its own technical expertise when making evaluations, and Paladin's disagreement with GSA's technical judgment does not show that it was

^{3/} Paladin cites engineering reports by two other structural engineers who inspected 215 Fremont. One engineering firm was hired by EPA, the other by Pacific Bell, also a tenant at 215 Fremont. The reports, dated October 26 and 27, respectively, generally accept the initial conclusions of Paladin's engineer, including the restriction that there should be no occupancy of the building within 20 feet of the Howard Street wall.

unreasonable.^{4/} See Hydro-Dredge Corp., B-215873, Feb. 4, 1985, 85-1 CPD ¶ 132.

Further, while Paladin contends that GSA's engineer was overly cautious, the record shows that even the reports by Paladin's engineers as to the extent of the damage to 215 Fremont are not as clear as Paladin suggests. In fact, the engineering report provided by Paladin's engineer on January 10, 1990, expands the interim findings provided on October 23, and in our view supports GSA's concern that the extent of damage to the building remained uncertain. For example, as stated earlier, Paladin's engineer, in the interim report, cautioned against occupancy of the building within 20 feet of the Howard Street wall. In his January 10 report, however, Paladin's engineer identifies more extensive damage, stating that "some of the exterior bays at Howard Street and Beale Street have suffered some damage and are not recommended for reoccupancy."

Under these circumstances, we see no basis to challenge the GSA's structural engineer's decision that 215 Fremont not be reoccupied without further study, or the contracting officer's decision to accept the engineer's recommendation regarding reoccupancy of the building.

GSA also states that it was concerned about the continued availability of Hawthorne's offer, and of acceptable office space in general. According to GSA, these factors contributed to its conclusion that it was not in the best interest of the government to wait for Paladin's engineering analysis. The record supports GSA's concerns that Hawthorne might rescind its offer to provide space to the government and that locating other space in the San Francisco Bay Area might be difficult. Press articles written within 2 weeks of the earthquake state that companies had sought more than half a million square feet of replacement office space since the earthquake, and that federal and state government officials sought 435,000 square feet of office space. Further, inquiries about new space were not limited to parties displaced by the earthquake; such inquiries included parties who had not suffered damage but were concerned about

^{4/} We note that the engineer recognized that his recommendation not to reoccupy 215 Fremont was "a more conservative measure than those recommended [by Paladin's engineer and the other two engineers]." GSA's engineer explained that his views incorporate "the federal government's policy of occupying [buildings] only if the safety of employees and the public they serve can be reasonably assured."

the buildings they were in and the possibility of future damage.

Specifically, the contracting officer states that the owners of the Hawthorne Plaza Building were claiming to receive numerous inquiries about space, leading the contracting officer to conclude that Hawthorne might withdraw its offer. The record shows that one such claimed expression of interest by the State of California was later verified to be a requirement of 110,000 square feet of office space; Hawthorne's acceptance of a tenant of this magnitude might have caused it to rescind its offer to GSA. Further, despite Paladin's claim that the Hawthorne Plaza Building had been attempting unsuccessfully to lease its space since 1986, it is reasonable to assume that, after the earthquake, potential lessees might find Hawthorne's new building, constructed to modern seismic standards, more attractive than in the recent past.

Finally, despite Paladin's claim of abundant vacant office space in the San Francisco Bay Area, GSA's well-publicized attempt to competitively procure office space for the EPA had resulted in only two offers: one from the incumbent, Paladin, and one from Hawthorne. Thus, the contracting officer reasonably was concerned about potential lessors' apparent reluctance to lease to the government in the San Francisco Bay Area. In this situation, losing access to Hawthorne's building while not knowing whether 215 Fremont would be tenantable in time for use by EPA, in a real estate market that appeared quite volatile in the week or two after the earthquake, entailed risks the contracting officer reasonably was unwilling to take.

Paladin also argues that GSA's claim of urgency is contradicted by award of a lease to an offeror whose building will not be ready for occupancy for 150 days after GSA approves the "build-out" drawings. GSA argues that it needed a firm commitment from a building it knew could meet the requirements of the SFO. Having awarded a lease for interim space for EPA, GSA did not need and could not use a building ready for immediate occupancy. Rather, GSA needed to know with certainty that it would have a permanent home for EPA when the interim lease expired. Thus, contrary to Paladin's position, GSA's decision to accept the Hawthorne building subject to a 150-day build-out period does not reflect on the urgency of the requirement to make award.

Paladin also argues that GSA's refusal to meet with it after the earthquake is evidence of agency bias. We disagree. GSA responds that it declined to meet with Paladin because it wanted to avoid reopening discussions with the offerors

and claims it had the information it needed. We find GSA's position reasonable. Further, while the record reflects a dislike of Paladin's building by EPA employees, there is no indication that the GSA employees conducting the procurement and evaluating the proposals were biased, nor that the views of the EPA employees affected GSA's evaluation.

Finally, Paladin argues that Hawthorne's building does not meet the requirements of the SFO and should not be accepted. According to Paladin, Hawthorne's building's loading dock is not enclosed or covered as required by the SFO, and certain floors in the building do not meet the requirement for a minimum of 13,000 square feet per floor. GSA responds that the loading dock is enclosed and compliant with the SFO; GSA also provided pictures to that effect, albeit showing that the roof of the dock is not completely covered. In reviewing an agency's assessment of a proposal we will not substitute our evaluation for the agency's but rather will examine the agency's assessment to ensure it had a reasonable basis. PacOrd, Inc., B-224249, Jan. 5, 1987, 87-1 CPD ¶ 7. We do not find GSA's interpretation that Hawthorne's loading dock is enclosed because it is surrounded by walls and has a partial roof to be unreasonable.

With respect to the minimum number of square feet per floor, Paladin asserts that Hawthorne's original offer shows that certain floors do not meet the requirement. The contracting officer's representative, in a sworn statement, replies that she has personally verified that the building meets the minimum square feet per floor requirement with the exceptions permitted for less than the minimum requirement on two of the floors for storage and a conference room. Based on this information we believe the evaluation of Hawthorne's offer was reasonable and within the discretion of the contracting officer.

In our view, the record in this case provides ample support for the contracting officer's conclusion that it was necessary to award the lease for EPA, thereby gaining a firm commitment, before risking losing access to the only offer of a building the contracting officer could conclusively establish met the government's needs. Waiting for as much as 3 months while Paladin analyzed the damage to its building could have meant losing access to the Hawthorne Plaza building after conducting an 8-month competition, including 3 rounds of BAFOs. Given the circumstances in

this procurement and in San Francisco in the days following the October 17 earthquake, we see no basis to object to the contracting officer's decision to proceed with award to Hawthorne.

The protest is denied.

for Robert P. Murphy
James F. Hinchman
General Counsel